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In The Supreme Court
Of The United States

OCTOBER TERM 1984

No.

VIRGIL AYERS, W.C. MEADERS, JR.,
BOYCE BLACKMON and JOE ACKER,

Petitioners,

v.

SPARTAN GRAIN & MILL COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Do *Fortner II*, *Spartan I*, and *Spartan II*, demand the holding that Spartan's program did not constitute an illegal tie-in, since there was no evidence that Spartan had a cost advantage in offering its program?

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The opinion of the Court of Appeals is Spartan Grain & Mill Co., v. Ayers et. al., 735 F.2d 1284 (11th Cir. 1984), (Spartan II) and is reprinted in

the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The Petition accurately states the jurisdiction of the Court.

QUESTION PRESENTED

Do Fortner II, Spartan I, and Spartan II, demand the holding that Spartan's program did not constitute an illegal tie-in, since there was no evidence that Spartan had a cost advantage in offering its program?

STATEMENT OF THE CASE

The Supreme Court denied certiorari in this case once before. See, Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419

(5th Cir. 1978), cert. denied, 444 U.S. 831 (1979) (Spartan I). Judge Wisdom's decision in Spartan I, sets out the background history of the poultry industry, and states the factual setting of this case.

Briefly, as was mentioned in Spartan I, there are several distinct steps in the production of broiler chickens. Following World War II, the companies in the industry moved toward the consolidation of these steps of production under one roof. As a result of this integration of the industry, independent segments of the industry which did not consolidate, like Spartan, a feed company, had no markets for their product. Similarly, the

independent farmer lost a market in which to sell his hatching eggs.

In the late 1960's Spartan established a program which gave Spartan a market for its feed and at the same time provided the farmer a market for his hatching eggs. Spartan negotiated with broiler hatcheries in Pennsylvania and Ohio for commitments to buy hatching eggs, and also arranged with primary breeders to produce flocks of laying chicks. This enabled Spartan to offer a program to the farmer-producer whereby Spartan would purchase the eggs from the producer's flock and the producer would feed Spartan feed to his birds.

The producers entered numerous

contracts with Spartan on a yearly basis from the late 1960's until 1971 and 1972 when Spartan phased out its program. In November, 1972 Spartan filed suit in federal court against producers Ayers, Blackman, and Meadors for unpaid balances of their feed accounts, and the producers filed an antitrust counterclaim. Together with Mr. Acker, who filed his antitrust suit in August, 1973, the producers challenged Spartan's program as a per se illegal tying arrangement and a per se illegal reciprocal dealing arrangement in violation of section 1 of the Sherman Act, 15 U.S.C. §1.

The trial court directed a verdict against Spartan at the close of the

producers' evidence, holding that the program was a per se violation of section 1 of the Sherman Act. On appeal to the United States Court of Appeals for the Fifth Circuit, Judge Wisdom reversed and remanded the case under United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977) (Fortner II). Applying the Fortner II standard, Judge Wisdom emphasized that on remand the producers must prove that Spartan had economic power in the market of the tying product in the form of a cost advantage over its competitors. This was the very test articulated by the Supreme Court in Fortner II.

During the retrial following the remand Spartan introduced substantial evidence that Spartan did not have a cost advantage over its competitors, and many competitors testified that they could have easily offered a program like Spartan's program had they desired to do so. With respect to whether Spartan had the cost advantage over its competitors as required by Fortner II and Spartan I, the jury was asked the following question as a second special interrogatory:

> Was Spartan Grain & Mill Company in the Royston area able to offer a guaranteed price for hatching eggs during the life of the flock at a time when its competitors under conditions then existing could not have offered an equivalent guaranteed price if they had elected to do so?

The jury answered "no" to this question and, based upon this answer, the Eleventh Circuit Court of Appeals reversed the trial court's judgment and directed that judgment be entered in favor of Spartan. Spartan Grain & Mill Co. v. Ayers, et. al., 735 F.2d 1284 (11th Cir. 1984) (Spartan II). The Eleventh Circuit held that it was error for the trial court to give the first special interrogatory to the jury, that the jury's answer to the second question conclusively showed that Spartan did not have a cost advantage over its competitors, and that judgment should have been entered in favor of Spartan. Specifically, in Spartan II

Judge Roney, speaking for the panel of Judges Godbold, Kovitch and Roney, stated:

> In the instant case, Spartan tied the purchase of grain to a guaranteed market for eggs. Fortner II dictates that the issue on which Spartan's antitrust liability turns is whether Spartan had a cost advantage in the tying product market. Since Spartan's tying product was a guaranteed market for eggs, the key factual inquiry should have been directed at Spartan's economic ability vis-a-vis its competitors to provide a market for eggs.
>
> When the special interrogatories are examined in light of this analysis, the first must be rejected as irrelevant to the question of economic advantage. The first interrogatory asked whether Spartan's arrangement with the eastern hatcheries to purchase broiler eggs was an economic advantage. In phrasing the interrogatory in that manner, the district court focused attention

on the economic advantage of the tying product instead of on Spartan's economic advantage in securing the tying product. The Supreme Court cautioned against exactly this mistep in Fortner II: economic power when measured strictly by economic advantage is "somewhat confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it." Fortner II, 429 U.S. at 621, 97 S.Ct. at 868. The district court's entry of judgment on the basis of the answer to the first interrogatory was error.

The question remains whether a third trial is appropriate. The answer in favor of Spartan on the second interrogatory is conclusive on the issue of economic power. Judgment should be entered for Spartan. (emphasis added).

735 F.2d at 1288-89.

REASONS FOR DENYING THE WRIT

I.

BOTH SPARTAN I AND SPARTAN II EXACTLY APPLY THE PRINCIPLES SET OUT BY THE SUPREME COURT IN FORTNER II.

In applying Fortner II to this case, Judge Wisdom, in Spartan I, stated:

> Without any evidence that the Credit Corp had some cost advantage over its competitors-or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected-the unique character of its financing does not support the conclusion that petitioners had the kind of economic power which Fortner had the burden of proving in order to prevail in this litigation." 429 U.S. at 621-22, 97 S.Ct. at 868.
>
> . . .
>
> Yet, although Spartan's program was "without like or

> equal" in that area of Georgia, it was not shown to be unique in the sense required in Fortner II. There was no evidence that Spartan had any cost advantage over its rivals. In fact, the eventual termination of the program might support an inference that Spartan had no advantages over its rivals; instead, it may have made a mistake they avoided.

581 F.2d at 427.

In Spartan II the Eleventh Circuit correctly held that, since the jury answered the second special interrogatory regarding cost advantage in Spartan's favor, it was conclusive that Spartan did not have the requisite cost advantage over its competitors.

II.

THE SUPREME COURT'S OPINION IN JEFFERSON PARISH DOES NOT CONTRADICT OR OVERRULE ITS OPINION IN FORTNER II.

Consistent with his opinion in Fortner II, Justice Stevens in Jefferson Parish Hospital District No. 2 v. Hyde, ___U.S.___, 104 S.Ct. 1551 at 1561 (1984), pointed out that the strict per se rule can be applied to tie-in arrangements when "the seller offers a unique product that competitors are not able to offer:" The question resolved in Fortner II, as was resolved in Spartan I and Spartan II, was that the defendants did not have a cost advantage over their competitors, that the competitors had

the ability to offer similar products had they chosen to do so, and that the programs, therefore, were not unique. In Jefferson Parish, Justice Stevens went on to point out that, when uniqueness is not at issue, a way to determine market power may be to evaluate the defendant's percentage of the market in comparison to the market percentage of others in the market who actually provide similar products or services. A finding that the defendant has a large percentage of the market may indicate that the defendant has market power.

It would be impossible, however, to apply a Jefferson Parish market percentage analysis to a Fortner II or

Spartan II situation where the Court has already determined that there are many competitors with the potential to offer the same program, but who do not actually offer it. There was no need to consider market percentages in Spartan II or in Fortner II, since there were numerous competitors, and the only real issue was whether the defendant's program was unique in that the defendants had a "cost advantage" over competitors.

CONCLUSION

In both Spartan I and Spartan II the Court of Appeals correctly applied the guidelines of Fortner II in disposing of the producers' antitrust claims, and

the Supreme Court's opinion in Jefferson Parish, does not contradict or overrule its opinion in Fortner II. Accordingly, Spartan respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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